

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.08.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.1107 of 2012
M.P.No.1 of 2012

Leena Menezes

.. Petitioner

Vs.

1. Mathana
2. Palaniappan
3. Balamurugan

.. Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decretal order dated 23.08.2011, made in I.A.No.1193 of 2011 in O.S.No.576 of 2004, on the file of the Additional District Munsif Court, Alandur.

For Petitioner : M/s.J.R.K.Bhavanantham

For R2 : M/s.C.T.Mohan

For RR1 & 3 : No appearance

ORDER

This civil revision petition has been filed against the fair and decretal order dated 23.08.2011, made in I.A.No.1193 of 2011 in

O.S.No.576 of 2004, on the file of the Additional District Munsif Court, Alandur.

2. The petitioner is plaintiff, respondents are the defendants in O.S.No.576 of 2004 on the file of the Additional District Munsiff, Alandur (Petitioner Originally filed O.S.No.171 of 1996, before the Subordinate Judge, Poonamallee). The Petitioner filed the said suit for declaration and permanent injunction, restraining the respondents from interfering with the peaceful possession and enjoyment of the suit property. The first respondent did not file any written statement. The respondents 2 and 3 filed written statement on 07.09.1998 and are contesting the suit. Trial commenced. The petitioner filed proof affidavit and was examined in chief on 03.06.2008. Subsequently, she did not appear for cross examination on many occasions. The suit was dismissed for default on 15.04.2009.

3. The petitioner filed I.A.No.580 of 2009 for restoration of the suit to the file. But the petitioner did not pursue the same and the said I.A. was dismissed for default. Then an application filed by the petitioner to restore the suit was allowed and subsequently,

O.S.No.576 of 2004 was restored to file. The petitioner filed the present Interlocutory Application in I.A.No.1193 of 2011 on the file of the District Munsif, Alandur, for amendment to include the prayer for recovery of possession.

4. According to the petitioner, earlier she had filed a suit in O.S.No.98 of 1993 on the file of the District Munsif Court, Poonamallee for declaration and permanent injunction against one Elumalai. The said suit was transferred to District Munsif Court, Tambaram and re-numbered as O.S.No.2588 of 1993 and interim injunction was granted in the said suit and an Advocate Commissioner was appointed as prayed for in I.A.No.173 of 1993. Taking advantage of the dismissal of the present suit for default, the respondents 2 and 3 trespassed into the suit property. In the circumstances, she prayed to amend the plaint to include relief of recovery of possession.

5. The respondents 2 and 3 filed counter affidavit and opposed the said application on the ground that in the written statement filed on 07.09.1998 itself they have stated that the petitioner is not in possession and the respondents are in

possession of the suit property from the date of their purchase on 30.11.1993 and their vendor had already fenced the property and appointed a watchman. The petitioner did not take any steps to amend the plaint at that time itself. After filing of the proof affidavit by the petitioner and examination of petitioner in chief, the petitioner did not appear for cross examination on many occasion. The suit was dismissed for default and application filed by the petitioner for restoration was also dismissed and subsequently, the suit was restored to file. The petitioner is seeking amendment, subsequent to the commencement of trial and petitioner has not stated that in spite of due diligence, she could not have filed application for amendment before commencement of the trial.

6. The learned Judge, considering the averments in the affidavit, counter affidavit, materials on record, written statement and judgment relied on by the respondents, dismissed the application, holding that the petitioner has not given any reason for filing application belatedly and that relief sought for is barred by limitation.

7. Against the said order of dismissal dated 23.08.2011, made in I.A.No.1193 of 2001 in O.S.No.576 of 2004, the present civil revision petition is filed by the petitioner.

8. The learned counsel appearing for the petitioner submitted that the petitioner was in possession of the suit property and the respondents trespassed in to the suit property only after dismissal of the suit for default on 15.04.2009. Interim injunction was granted, pending suit and once suit is restored, interim injunction also gets restored. The mere averments in the written statement that the respondents are in possession of the suit property will not amount to their possession of the suit property. The possession can be decided only by letting in evidence during Trial. The learned Judge, erred in holding that the relief of possession is time barred as petitioner did not take steps to amend the plaint, when in the year 1998 the respondents have claimed to be in possession. The learned Judge, ought to have seen that the petitioner can file application only when the respondents have trespassed in to the land. The respondents have trespassed into the suit property only after the dismissal of earlier suit, O.S.No.2588 of 1993. The

learned counsel appearing for the petitioner, in support of his contentions, relied on the following judgments:

(i) (2004) 6 SCC 415 (Pankaja and another Vs. Yellappa (Dead) By Lrs and others):

"14. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straitjacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case.

16. This view of this Court has, since, been followed by a three-Judge Bench of this Court in the case of T.N. Alloy Foundry Co. Ltd. V. T.N. Electricity Board. Therefore, an application for amendment of the pleading should not be disallowed merely because it is opposed on the ground that the same is barred by limitation, on the contrary, application will have to be considered bearing

in mind the discretion that is vested with the Court in allowing or disallowing such amendment in the interest of justice."

(ii) AIR 1957 SC 357 (1) (L.J. Leach and Co. Ltd., and another, V. Mrs. Jaidine Skinner and Co.,):

"16. It is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken in account in exercise of the discretion as to whether amendment should be ordered and does not affect the power of the Court to order it, if that is required in the interest of justice. In Charan Das V. Amir Khan, 47 Ind App 255: (AIR 1921 Pc 50(A) the Privy Council observed):

"That there was full power to make the amendment cannot be disputed and though such a power should not as a rule be exercised where the effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are out-weighed by the special circumstances of the case".

(iii) (1998) 1 SCC 614 (Indira Vs. Arumugam and another):

"5. It is therefore, obvious that when the suit is

based on title for possession, once the title is established on the basis of relevant documents and other evidence unless the defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited. Unfortunately, this aspect of the matter was missed by the learned Judge and, therefore, the entire reasoning for disposing of the second appeal has got vitiated. Only on that short ground and without expressing any opinion on the merits of the question of law framed by the learned Judge for disposing of the second appeal, this appeal is allowed. The impugned decision rendered is set aside and the second appeal is restored to the file of the High Court with a request to proceed further with the hearing of the appeal with respect to the substantial question aforementioned in accordance with law. No costs."

9. Per contra, the learned counsel appearing for the respondents submitted that for 73 years prior to filing of the suit, the respondents' predecessors were in possession and first respondent purchased the property on 30.11.1992 and she was in possession and enjoyment of the same till she sold to the respondents 2 and 3 on 30.11.1993 and respondents are in possession and enjoyment of the same from that date onwards. The respondents 2 and 3, in the written statement filed in the year

1998 and 1999, have stated that they are in possession and enjoyment of the suit property and petitioner was never in possession and enjoyment of the suit property at any point of time. In spite of the same, the petitioner did not take any steps for seeking a relief of possession. After the trial has commenced, the petitioner has come out with the present application after 13 years of filing of the written statement and the claim is barred by limitation. The petitioner has not given any valid reason for the delay in filing the application for amendment. The learned counsel appearing for the 2nd respondent, in support of his contention, relied on the judgment:

(2012) 11 SCC 341 (Abdul Rehman and another Vs. Mohd. Ruldu and others):

"11. At present, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, it could not have been sought earlier. The object of the rule is that courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. This Court, in a series of decisions has held that the power to

allow the amendment is wide and can be exercised at any stage of the proceeding in the interest of justice. The main purpose of allowing the amendment is to minimise the litigation and the plea that the relief sought by way of amendment was barred by time is to be considered in the light of the facts and circumstances of each case."

10. Heard the arguments of learned counsel appearing for the petitioner and second respondent and perused the materials available on record and judgments relied on by both the parties.

11. The petitioner is seeking amendment to include the relief of possession in the suit filed by her for declaration and injunction. According to the petitioner, interim injunction was granted, pending suit. The suit was dismissed for default. The respondents, taking advantage of the dismissal of the suit, trespassed into the suit property. A reading of the affidavit filed in support of his application for amendment shows that the petitioner has not given any date as to when respondents trespassed into the suit property after dismissal of the suit for default. The petitioner also has not given a date on which, she came to know about the trespass by the respondents, except making a vague statement that when she

visited the suit property, she found the respondents have trespassed into the suit property. In the written statement filed by the respondents in the year 1998 and 1999 itself, respondents have stated that they are in possession from the date of purchase and the vendor, first respondent was in possession from the date of her purchase. The petitioner has filed O.S.No.98 of 1993 against one Elumalai, husband of first respondent on the file of District Munsif Court, Poonamallee which was transferred to District Munsif Court, Tambaram and re-numbered as O.S.No.2588 of 1993. The above suit was for injunction on the ground that said Elumalai was trying to trespass into the suit property. It is also to be noted that trial in the present suit commenced in the year 2008, by chief examination of the petitioner. She did not appear before the Court for being cross examined and suit was dismissed for default. The application filed by her for restoration of suit was also dismissed. Subsequently, by the application filed by the petitioner, suit was restored to file. After restoration, the petitioner filed application for amendment in the year, 2011. By the time, 13 years have passed from the date of filing of the written statement by the respondents, claiming to be in possession from the year, 1993. The said application for amendment has been filed after commencement of

trial. Proviso to order 6 Rule 17 restricts the discretion of the Court to allow the application for amendment after commencement of trial. Even though, there is no total prohibition for amendment after commencement of trial, Court

must be satisfied that in spite of due diligence, the party could not have filed application for amendment before commencement of trial. In the present case, the petitioner has not stated as to when the respondents have trespassed into the suit property and as to when she came to know about the same. She has not stated that in spite of due diligence, she could not have filed application for amendment earlier.

12. For the above reasons, the civil revision petition is liable to be dismissed. The learned Judge has appreciated the materials available on record and law on this aspect in proper perspective and dismissed the application. Judgment relied on by the counsel appearing for the second respondent is squarely applicable to the facts of the case. There is no irregularity or illegality, warranting interference with the order of the learned trial Judge dated, 23.08.2011.

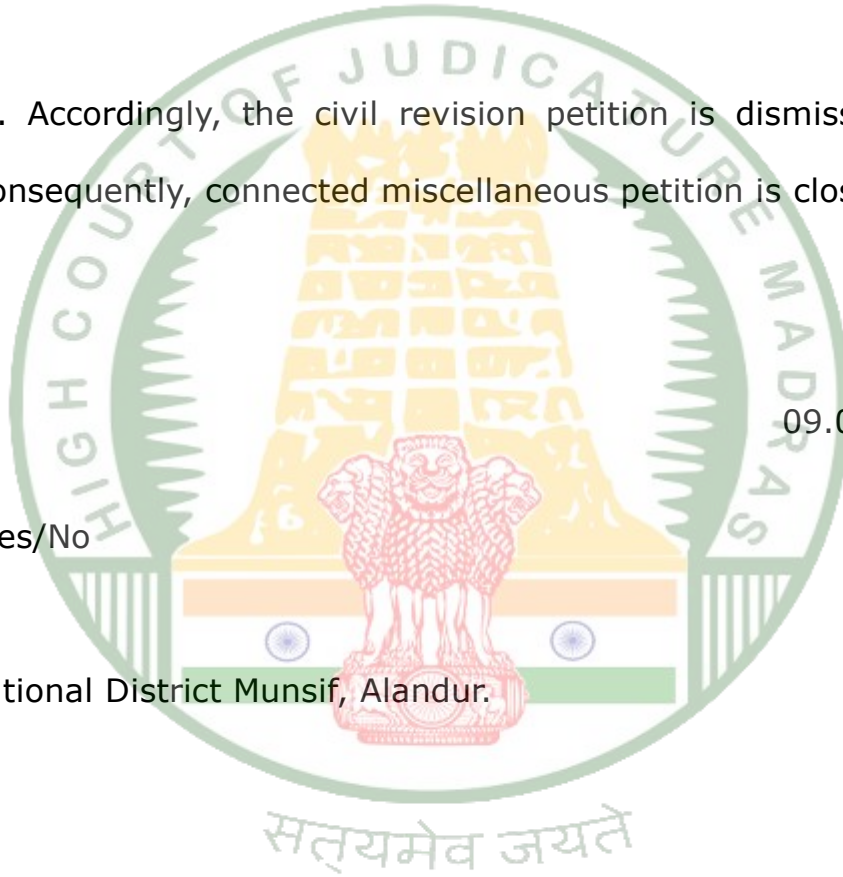
13. Accordingly, the civil revision petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

09.08.2017

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Index: Yes/No

To

The Additional District Munsif, Alandur.



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V.M.VELUMANI, J.

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